(3)

08-1464

JUN 26 2009

No.: _____

In the

Supreme Court of the United States

EAST END PROPERTY COMPANY #1 LLC, MARK KASPIEV, JOHN McCONNELL, JOHAN McCONNELL, DONALD SEUBERT, PATRICIA SEUBERT, FRANCESCA HURLEY, MICHAEL HURLEY, LAURENCE EINUIS, EMILY KARLOVITS, STEPHEN HENRY, THE YAPHANK TAXPAYERS AND CIVIC ASSOCIATION, INC. and the SOUTH YAPHANK CIVIC ASSOCIATION, et al.,

Petitioners,

v.

TOWN BOARD OF THE TOWN OF BROOKHAVEN, THE TOWN OF BROOKHAVEN, and CAITHNESS LONG ISLAND, LLC, et al.,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether property owners who unsuccessfully asserted exclusively state law claims in state court may assert a substantive due process violation under the United States Constitution for the first time in this Court, where they failed to raise, argue or preserve any federal or U.S. constitutional issue of any kind in the state courts below and where those state courts have not considered such issues in this litigation?

2. Whether a local zoning decision to approve the development of an industrial project on an industrially-zoned parcel of land can give rise to a violation under the United States Constitution of the substantive due process rights of owners of other property located in excess of one-half mile from the project site?

3. Whether property owners who live in excess of one-half mile from the project site, and who were found in the state courts below to have suffered no injury-in-fact and no harm different from other members of the public, and where the state courts also found, as a matter of fact, that the challenged project would not result in any significant adverse environmental impact, have Article III standing based on alleged injury to their real property or to their environment?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

CORPORATE DISCLOSURE STATEMENT

Respondent Caithness Long Island, LLC is owned by Caithness Energy LLC and Brookhaven Electric LLC; has the following affiliates: Brookhaven Generation LLC, CELI Land LLC and Caithness Long Island Power LLC; and has no subsidiaries.

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INTRODUCTION

In 2003, Respondent Long Island Power Authority ("LIPA"), consistent with its statutory obligations, commenced a lengthy process aimed at developing additional electric-generation facilities to meet the urgent energy needs of Long Island, New York. After a comprehensive request for proposals ("RFP") process, a state-of-the-art 350 megawatt electric generating facility ("the Project") proposed by Respondent Caithness Long Island LLC ("Caithness") was chosen by LIPA as one of the projects to meet Long Island's energy needs. After that RFP process, an exhaustive environmental review assessment, two in-depth administrative zoning proceedings before the Town of Brookhaven ("the Town"), and approvals by numerous other governmental authorities, including the Offices of the New York State Comptroller and the New York State Attorney General, the County of Suffolk, the New York State Public Service Commission, the New York State Department Environmental Conservation and the U.S. Environmental Protection Agency, Caithness finally began construction of its facility in April 2007. The Project is located on an industrially-zoned parcel of land located within the Town on Long Island. The Project will become fully operational in July 2009, at which point it will be one of the cleanest power plants in New York State, far more efficient than any of the existing baseload power plants on Long Island.

Petitioners --- who are the owners (East End Property Company # 1, LLC ("East End")) of a large residential housing complex located in excess of one-

half mile from the Caithness facility and others located even farther away --- have mounted an unrelenting assault on the Project. They have brought five separate lawsuits in the New York State courts, on a wide range of grounds, trying to halt the Project. All of their arguments have been meritless, and all of their lawsuits have been rejected. On November 28, 2008, the Appellate Division of the Supreme Court of the State of New York ("Appellate Division") issued three separate orders ("the Orders") which collectively upheld the validity of certain zoning approvals granted to Caithness by two municipal boards --- Respondent Town Board of the Town of Brookhaven ("Town Board") and Respondent Planning Board of the Town of Brookhaven ("Planning Board"). On February 24, 2009, the New York Court of Appeals denied Petitioners' application for leave to appeal from the Orders. Petitioners now ask this Court to grant certiorari.[1]

The petition for certiorari ("the Petition") is not only meritless, it is frivolous. Petitioners never once raised a federal or constitutional issue in any of the New York courts below. As a result none of these courts had cause to even address, let alone rule on, any federal or constitutional issue. Although Rule 14(1)(g)(i) of this Court compels Petitioners to

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[1] The Orders were issued by the Appellate Division when it denied Petitioners' appeals in the three lawsuits commenced in the Supreme Court of the State of New York (Suffolk County) ("the State Court"). These three lawsuits are described more fully below and are sometimes hereinafter referenced as the Special Permit Appeal, the Site Plan Appeal and the Re-Issuance Appeal. See Appendix to Petition ("Appendix") at 3a-10a, 11a-13a and 14a-16a.

point out specifically in the record where any such issue was raised, Petitioners have failed to do so. *See* Point I. *infra*.

In any event, there is no federal or constitutional issue in this case which warrants review by this Court. *See* Point II, *infra*. For the purpose of trying to fabricate such an issue, Petitioners have deliberately mischaracterized critical facts. Some of their more egregious factual distortions are discussed below. The crux of Petitioners' argument, *i.e.*, that they were deprived of substantive due process by reason of the allegedly unlawful conduct of Caithness and the Town --- which, according to Petitioners, consisted of "bribery, or something close to it in the context of municipal decision-making", whereby the Town effectively sold zoning approvals in exchange for large unauthorized contributions from Caithness --- is premised on a disgraceful falsification of what actually occurred. As amply demonstrated by the record, the zoning approvals issued by the Town to Caithness were based on the voluminous evidence submitted by Caithness which demonstrated that it was entitled to the requested zoning approvals under the applicable regulations, not on any improper payment of money. Indeed, during oral argument of the appeals before the Appellate Division, Petitioners' counsel conceded that there was substantial evidence to justify issuance of the zoning approvals under the applicable regulations of the Town.

The payment of "$150-200 Million" (hereinafter referred to as "the Community Benefits Package") to which Petitioners object was nothing more than payments-in-lieu of taxes ("PILOTS") to

the local taxing authority (*i.e.*, the Town), plus additional payments to the Town and nearby school districts for community benefits, including scholarship and apprenticeship programs. There were no bribes or under-the-table payments here. Although Petitioners claim that there is no authority whatsoever for the Community Benefits Package, this is simply incorrect. PILOT agreements with local Industrial Development Agencies ("IDAs") are commonly used in circumstances to assess the property value of parcels containing an improved industrial use like a power plant. A PILOT agreement provides long-term certainty for both the local taxing jurisdiction and the responsible taxpayer, and avoids tax certiorari litigation in the future. New York law grants broad authority to the Town's IDA to require PILOTs and to enter into agreements for such payments. N.Y. Gen. Mun. Law §§ 858, 874. LIPA, the party ultimately responsible for the payments, is also empowered by state law to enter into such agreements with municipalities. Similarly, there is no legal prohibition against a developer offering to support various local programs in the communities where its project will be located. N.Y. Pub. Auth. Law §§ 1020-f, 1020.

Petitioners contend that the zoning approvals granted by the Town were unlawfully conditioned on the Community Benefits Package. But it is well-established that municipal boards may impose conditions in connection with the issuance of a zoning approval and, in this case, the Town had a regulation which expressly authorized the imposition of reasonable conditions. *See* Brookhaven Town Code § 85-31.3. Here, the condition reasonably

related to the specific use for which a special permit was required. The condition merely required that Caithness, LIPA and the Town IDA complete the agreements relating to the Community Benefits Package (the parameters of which were already known and made public seven months earlier) prior to commencing construction. Significantly, the agreements actually setting forth the specific terms of the Community Benefits Package (including the PILOT) were reviewed and approved by the Office of the New York State Comptroller and the New York State Attorney General, as required by state law, and Petitioners never chose to challenge those approvals or agreements.

In sum, the Petition must be denied because (a) Petitioners never raised any federal question or constitutional issue in the courts below, and (b) there has been no egregious conduct by the respondents which violated any of Petitioners' substantive due process rights.[2]

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[2] In addition, Petitioners also lack Article III standing to assert any such claim. *See* Point III, *infra*.

HISTORY OF THE CASE[3]

A. The Caithness Project

LIPA, which is obligated by statute to provide reliable electric service to its ratepayers, projected in 2003 that the underlying peak demand for energy on Long Island would grow by approximately 100 megawatts ("MWs") each year through 2012. JR 93-6, 427B-430, 3043-44, 6270-73. To meet this need, LIPA issued an RFP that would furnish 250 to 600 MWs of electric capacity. JR 417A, 6269-70. In June 2004, LIPA selected the Caithness proposal as one of two projects necessary to meet Long Island's energy needs. JR 405, 427D. LIPA determined that the Caithness Project would (i) enhance the reliability of the power system by increasing the generation of electricity on the eastern end of Long Island, where load growth is highest, (ii) minimize customer rates by more efficiently utilizing fuel, and (iii) promote a healthy environment by having, on a per megawatt-hour basis, very low air emissions. JR 427A-430, 883-95, 5054-55, 6269-70.

The Caithness facility will be 34% more efficient than the average Long Island power plant. It will consume 94% less water than a typical plant. It will be the cleanest power plant in New York State when it becomes operational --- 20 times cleaner per kilowatt hour than existing baseload plants on Long Island. The Caithness Project is anticipated to

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[3] Petitioners filed three separate records in the Appellate Division in connection with each of the three appeals. References herein to the records for the Special Permit Appeal, Site Plan Appeal and Reissuance Appeal are designated, respectively, as "JR ___", "SPR ___" and "RR __".

reduce greenhouse gases "well past the Kyoto Accord" and will result in emissions reductions equivalent to taking 125,000 cars off the road. JR 883-95, 2678-83. The Caithness facility, which will come on line in July 2009, is critical to meet New York's energy needs. Without it, there will be a severe shortage of electricity on Long Island in the very near future. JR 94-95.

B. SEQRA Review of the Project

LIPA, as the lead agency, undertook a lengthy and exhaustive environmental review of the Caithness Project under the State Environmental Quality Review Act ("SEQRA"). N.Y. Env. Cons. L. § 8-0101, *et seq.* This process lasted approximately sixteen months. LIPA issued its Final Environmental Impact Statement ("FEIS") in June 2005. JR 388-1047, 5140-44. After reviewing all areas of potential environmental impact, the FEIS that concluded that the Caithness Project would not, either individually or cumulatively with other LIPA projects or nearby sources, result in any significant adverse environmental impact. No reputable environmental group has ever voiced opposition to the Caithness Project.

C. The SEQRA Lawsuit

On January 25, 2006, Petitioners commenced their first lawsuit to challenge the Project ("the SEQRA Lawsuit"). On that date, they began an action in the Supreme Court of the State of New York (Nassau County) challenging the SEQRA review process conducted by LIPA on every

procedural and substantive ground they could concoct, including claims that the environmental review failed to give due consideration to the residents of the Atlantic Point community (owned and operated by East End) located over 1/2 mile away. The lower court in the SEQRA Lawsuit upheld the SEQRA review process conducted by LIPA in all respects and rejected all of Petitioners' challenges to it. *Id.* Petitioners then appealed that decision to the Appellate Division, which affirmed, concluding, *inter alia*:

> LIPA satisfied its obligations under SEQRA by taking a "hard look" at the potential environmental impacts of the project in a final EIS. . . which thoroughly analyzed, among other things, land use and zoning impacts, impacts on historic, archaeological, and cultural resources, traffic, transportation, and noise impacts, impacts on visual resources and neighborhood character, air quality impacts, socioeconomic impacts, groundwater usage and water quality impacts, stormwater runoff impacts, terrestrial ecology impacts, cumulative impacts, and alternatives to the project.

East End v. Kessel, 851 N.Y.S.2d 565 (App. Div. 2007). The Appellate Division found that "in its lengthy analyses of potential environmental impacts, the conclusion of LIPA is supported by accepted governmental guidelines and scientific authorities."

Id. The New York Court of Appeals subsequently denied Petitioners' motion for leave to appeal in the SEQRA Lawsuit. *East End v. Kessel*, 892 N.E.2d 394 (N.Y. 2008).

D. Caithness's Special Permit Application to the Town Board

Because the Caithness Project is located in the Town's L-1 District, Caithness was required to obtain a special permit from the Town Board before constructing its facility. In connection with this permit, Caithness also asked the Town Board for relief from certain height limitations otherwise applicable to several components of the Caithness Project. Under the Brookhaven Town Code and New York State Town Law, the Town was authorized to grant this relief in the form of either a waiver or an area variance.

The Town Board held several public hearings on the Caithness Project. During these hearings, testimony was provided with respect to (i) the growing demand for electricity (in Brookhaven in particular), (ii) the need for the Caithness Project to enable LIPA to fulfill its obligations to its customers, (iii) the Project itself, including an overview of its minimal impact and significant benefits, (iv) the Project's compliance with Town Code requirements; and (v) the need for relief from the otherwise applicable height restrictions. JR 2677-86, 3061-83; JR 3133-355. None of the information and analyses presented by Caithness justifying the requested relief from the height restrictions was contested by any individual or party. JR 3133-355. During these hearings, the Town Supervisor stated that "[t]his

[proposal] received voluminous public commentary and input, more than I think of any other proposal in the history of the township." JR 3398-99.

E. The June 6 and July 25, 2006 Votes of the Town Board

The Project appeared on the Town Board's calendar for June 6, 2006. JR 3453. Before voting on the special permit, the Town Board was first required to consider a resolution to adopt SEQRA findings with respect to the environmental review conducted for the Project. Two members of the Town Board stated at that time that they needed more time to evaluate the Project. JR 3477-78. Therefore, when a motion on the SEQRA findings resolution was made, the Town Board voted 4 to 3 not to adopt it at that time.

With this vote, the Town Board made no substantive finding of any kind with respect to environmental impacts associated with the Project. The Town Board merely voted not to adopt SEQRA findings at that time. As a result, the Caithness application for a special permit could not be and was not decided at the meeting, *i.e.*, since the Town Board failed to adopt SEQRA findings on June 6, 2006, it did not proceed to consider any further action with respect to the Caithness special permit application that evening. JR 3480. Instead, the record shows that the Caithness special permit application remained on the Town Board's "pending decision" calendar for subsequent meetings of the Town Board. JR 3571-72, 3971-72. In sum, the Town Board did not vote on (and certainly did not deny) Caithness's special permit application on June

6, 2006, and did not make any substantive determination of any kind regarding the merits of the application, or its environmental impacts.

On July 25, 2009, after additional meetings and hearings, the Town Board voted to formally reintroduce a SEQRA findings resolution, which passed by a vote of 5 to 2. The Board then approved the Caithness special permit application, along with the requested relief from the height restrictions, also by a vote of 5 to 2. The administrative record conclusively demonstrated that Caithness satisfied all of the criteria necessary to support the Town Board's limited grant of variances and waivers, and is devoid of a single substantive reason indicating that the waivers/variances were not appropriate or that Caithness should not have received the special permit. JR 3042-3083.

F. The Community Benefits Package

As early as January 2006, a draft Community Benefits Package had been proposed to the Town in connection with the Project pursuant to which Caithness would pay at least $139 Million in PILOTs over a 20-year period (which payments LIPA would reimburse under their agreement with Caithness) and LIPA would pay about $11 Million to the Town and nearby school districts for additional community programs. Petitioners challenged the Community Benefits Package in the SEQRA Lawsuit (discussed above) where their claims were dismissed in their entirety. *See East End v. Kessel*, 851 N.Y.S.2d 565 (App. Div. 2007). As of July 2006, the parties had added an additional $1 Million to the Community

Benefits Package to support local community programs, increasing the total value from $150 Million to $151 Million.[4] On July 25, 2006, when the Town Board issued its special permit to Caithness, it included a condition which stated that, before Caithness could begin construction of the Project, agreements had to be in place between the Town, LIPA and the Town's IDA requiring payments of at least the amounts contemplated in the Community Benefits Package.[5]

G. Site Plan Approval

After the Town Board's special permit approval, the Town Planning Board considered Caithness's site plan application. SPR 334-419. Caithness demonstrated that the Project met all applicable site plan requirements, including the bulk and height requirements of the Town Code

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[4] It is this less than one percent increase in the Community Benefits Package from January to July 2006 which, according to Petitioners, was the "massive sum of money" that caused the "corruption of [the] local land use process." *See* Petition at 5. The increase went to a local school district.

[5] Negotiations regarding the Community Benefits Package continued well after the Town Board issued all local zoning approvals to Caithness. The Community Benefits Package (due to the PILOT component) ultimately exceeded this amount. The final PILOT agreement between the IDA and Caithness required Caithness to pay $184 Million over approximately 22 years. LIPA and the Town also entered into a second agreement, which was approved by the New York State Comptroller, and under which LIPA formally committed to pay $12 Million to fund certain school district and community programs. As previously noted, neither agreement was ever challenged in court.

(consistent with the waivers and variances that had been granted by the Town Board). SPR 196-209, 344-353. On September 25, 2006, the Planning Board unanimously voted to approve its own SEQRA findings and the Caithness site plan application. SPR 424-443.

H. Special Permit Appeal In State Court

After the Town Board approved Caithness's special permit application, Petitioners commenced a judicial proceeding in State Court to challenge it ("Special Permit Appeal"). They raised various procedural objections to the Town Board's action, including a claim that the Town Board's re-vote on the SEQRA findings violated SEQRA. They also contended that the Town Board improperly granted Caithness relief from certain height restrictions. With one exception, the State Court dismissed all of Petitioners' claims. *See* Appendix at 24a-71a. It rejected all the zoning decision challenges on the ground that Petitioners lacked standing to assert such claims. It rejected all of Petitioners' remaining claims because those claims had already been decided against Petitioners on various grounds in the SEQRA Lawsuit. *Id.*

The single exception was that, when the State Court reached the SEQRA findings re-vote issue, it found that the Town Board's change in vote with respect to adoption of the SEQRA findings for the Project (*i.e.*, voting not to adopt the findings on June 6, 2006 and then voting to adopt the findings on July 25, 2006) was improper because the SEQRA findings were adopted "absent an explanation in the SEQRA

Resolution for the adoption (as opposed to the prior denial), and without any discussion on the record prior to said adoption." *See* Appendix at 56a. The State Court remanded the matter to the Town for "proper action" to address this issue. *Id.*

I. Site Plan Appeal In State Court

In a separate judicial proceeding, Petitioners also challenged the Planning Board's issuance of the site plan approval for the Project ("Site Plan Appeal"). The State Court dismissed this lawsuit, finding Petitioners lacked standing because they did not live close enough to the Project to warrant an inference of injury, because they did not submit any affidavits to show actual injury, because they did not show they were within the "zone of interest" protected by the site plan approval process, and because they failed to demonstrate any injury different from the public at large. *See* Appendix at 18a-23a.

J. Re-Approval by the Town of the Special Permit and Site Plan

The Town and Caithness ultimately appealed from the State Court's determination on the special permit approval to the Appellate Division, and prevailed (discussed below). Nevertheless, while that appeal was pending, the Town also acted on the remand. On June 5, 2007, the Town Board voted to re-adopt SEQRA findings relating to the Caithness Project and to re-approve the special permit and waivers/variances ("June 2007 Resolution"). The June 2007 Resolution to adopt the SEQRA findings

included an explicit explanation for the change in vote between June 6, 2006 and July 25, 2006:

> . . certain of the Town Board councilmembers, as of June, 2006, had not fully and completely reviewed the substantial record in this matter and therefore were not prepared at that time to adopt the Findings Statement, but instead wished to, and actually did, further examine the voluminous information and documents contained in the record (including the extensive two-volume FEIS) concerning the project in order to fully understand the proposal, including without limitation the project's scope, purpose and technology, its potential environmental impacts and the independent environmental review process regarding the pipeline that will supply natural gas to the project, and now, having fully reviewed the record, are prepared to adopt the Findings Statement. . .

RR 354-55. Based on this June 2007 Resolution, the Town Board re-issued the special permit to Caithness. RR 360-71.

K. The Re-Issuance Appeal In State Court

Even though the June 2007 Resolution included an explicit explanation of why there was a re-vote on the SEQRA findings statement, Petitioners filed yet another lawsuit to challenge the

re-approvals, re-asserting several previously rejected claims and arguing, contrary to well-settled state law, that the Town Board could not re-vote on the SEQRA findings resolution in the absence of a Project change ("Re-issuance Appeal"). The State Court denied this challenge by the Petitioners in all respects. *See* Appendix at 72a-93a. The State Court explained:

> In rendering this decision, this Court will defer to the explanation of Respondents-Defendants BROOKHAVEN for reaching a different result, sustaining its determination because a rational explanation for reaching the different result was provided. As noted above, New York courts accord great deference to the explanations offered by boards for their contrary determinations under similar circumstances, and this Court finds that Respondents-Defendants have adequately met that standard.

See Appendix at 87a.

L. The Appellate Orders Rejecting Petitioners' Claims

Petitioners appealed all the decisions of the State Court to the Appellate Division. It lost all the appeals.

In reviewing the State Court's decision in the Special Permit Appeal, the Appellate Division found that "the Town Board conducted an adequate and appropriate environmental review" and that the Petitioners "are foreclosed by the doctrines of *res judicata* and collateral estoppel from claiming that the SEQRA review conducted by LIPA was inadequate since those claims were litigated or could have been litigated in the [SEQRA Lawsuit]." *See East End Prop. Co. #1 LLC v. Town Bd of Brookhaven*, 868 N.Y.S.2d 264 (App. Div. 2008). The Appellate Division also found that the State Court:

> properly determined that the petitioners lacked standing to assert their claims challenging the Town Board's approval of the special permit, waiver, and area variances. The petitioners may not avail themselves of the presumption of injury in fact since they have not demonstrated that their properties lie in close proximity to the project [citations omitted], and they have otherwise failed to demonstrate that they will suffer any injury which is "in some way different from that of the public at large. [citations omitted]."

See Appendix at 10a.

Regarding the SEQRA revote issue, the Appellate Division decided that the lower court was

wrong in remanding the matter back to the Town Board for further explanation. It stated as follows:

> The Supreme Court, however, improperly granted those branches of the petition . . . which alleged that the Town Board acted in an arbitrary and capricious manner by failing to articulate a reason why it passed the resolution approving the SEQRA findings statement after the resolution had been previously rejected. Following the meeting of June 6, 2006, at which the Town Board failed to adopt the resolution, the applications for the proposed land-use approvals were held in abeyance and remained on the Town Board's meeting agenda as "pending decisions" until July 25, 2006. Further, as the Town Board correctly argues, neither SEQRA nor its implementing regulations contain any provision prohibiting the Town Board from reconsidering its own unchanged SEQRA findings statement. Rather, SEQRA only requires that an involved agency such as the Town Board make its own written findings statement before approving a project subject to an FEIS (see 6 NYCRR 617.2[p], 617.11[c]). Contrary to the petitioners' contention, 6 NYCRR 617.11(a) does not preclude a revote under the

> circumstances presented here since the Town Board did not vote to amend its finding statements but, rather, revoted on a resolution to adopt its own unchanged SEQRA findings statement. Accordingly, the petitioners' contention that the Town Board lacked the authority and jurisdiction to conduct the revote is without merit. Moreover, the Town Board's determination to adopt, rather than reject, the resolution to approve the SEQRA findings statement was neither arbitrary nor capricious, but was based on reasons readily apparent on the face of the record.

See Appendix at 8a-9a.

In reviewing the State Court's decision in the Site Plan Appeal, the Appellate Division affirmed the lower court's decision, finding that the lower court properly concluded that the Petitioners lacked standing to commence the proceeding. *See East End Prop. Co. #1 LLC, et al. v. Planning Bd. of Town of Brookhaven*, 867 N.Y.S.2d 685 (App. Div. 2008).

In reviewing the State Court's decision in the Re-issuance Appeal, the Appellate Division dismissed the Re-issuance Appeal because its decision in the Special Permit Appeal rendered it academic. *See East End Prop. Co. #1 LLC v. Town Bd. of Town of Brookhaven*, 867 N.Y.S.2d 686 (App. Div. 2008).

M. Denial Of Further Review By The New York Court Of Appeals

On May 6, 2008, Petitioners asked the New York Court of Appeals for permission to further appeal from the Orders. They raised numerous issues, but they did not raise any federal or constitutional issue. The New York Court of Appeals denied this application on February 24, 2009. *See* Appendix at 1a-2a.

PETITIONERS' MISSTATEMENTS OF FACT

The Petition is replete with deliberate factual misstatements, among them the following:

- Petitioners characterize the payments which Caithness agreed to make in this case as a "payoff" (*see* Petition at 11), as "bribery or something close to it" (*see* Petition at 17), as the "purchase of otherwise unauthorized development rights" (*see* Petition at 5), as a "plot apparently instituted by. . . Caithness" (*see* Petition at 6), and by other similar pejorative terms. This is truly scandalous and outrageous. As discussed above, the Community Benefits Package consisted entirely of PILOTs to the Town and of payments toward community programs in the vicinity of the Project. The Community Benefits Package was publicly discussed, was publicly approved and was reviewed by other public agencies outside of the Town, including the New York State Comptroller and Attorney General. The Community Benefits Package is authorized under state law and the Petitioners chose not to directly challenge the state's approval of it.

- Petitioners assert that the permits issued to Caithness by the Town exceeded the local zoning requirements (*see* Petition at 3) and that these municipal approvals were unauthorized and were granted only "in exchange for paying massive sums of money to the favored constituencies of local officials" (*see* Petition at 5). This is untrue. The Town's regulations specifically authorize electric-generating facilities within the Town's L-1 District by special permit issued by the Town Board. *See* Town Code § 85-309. The Town's regulations also

specifically authorized the Town Board in connection with a special permit application to (i) waive or modify any otherwise-applicable zoning requirements if certain criteria are met, or, alternatively, (ii) grant variances from the otherwise-applicable zoning requirements, including height restrictions. *See* Town Code § 85-31. One of the major issues addressed by the Town Board in the public hearings on Caithness' special permit application was whether such a waiver or variance was warranted. After hearing all the testimony and evidence, the Town Board determined that the Caithness met the standards for both. JR 4043-4053. There is no basis at all for Petitioners' contention that the Town in any way exceeded its authority in granting the zoning approvals which it issued for the Project.

- Petitioners claim that Caithness has a "structural volume some three times greater than local zoning permits." *See* Petition at 3. This is false. The Town has no such requirement. To the contrary, the Project fell well within the Town's lot coverage and floor area ratio requirements.

- Petitioners imply that the Project will have an adverse visual impact on them by pointing out that the FEIS "specifically identified" their community as a "visual receptor" of the Project. *See* Petition at 5, n3. To the contrary, however, the visual analysis in the FEIS showed that Petitioners' community would not be adversely affected at all by the Project due to its distance (*i.e.* in excess of 1/2 mile) and by reason of intervening structures and foliage. JR 1252-1291. The adequacy of the visual

analysis in the FEIS was confirmed in the SEQRA Lawsuit, where no further appeals lie.

- Petitioners state that the Town Board initially voted to deny approval to the Project and then --- allegedly in exchange for an illegal payment of money -- changed its vote and approved the Project. *See* Petition at 4. This, again, is untrue. The Town Board voted only once on whether or not to grant the necessary approvals to the Project --- on July 25, 2006.
- There was no improper "change in vote" by the Town Board on the SEQRA issue. SEQRA requires that, before making a substantive determination on an action such as Caithness's special permit application, a SEQRA findings statement must be adopted. With its vote on June 6, 2006, the Town Board made no substantive determination or finding of any kind with respect to the environmental impacts associated with the Project. It simply voted not to adopt a SEQRA findings statement (either positive or negative) at that time. Nothing in SEQRA required the Town Board to explain why it was voting to adopt SEQRA findings on July 25, 2006 after not doing so on June 6, 2006. In any event, the administrative record clearly indicated the reason for the change in vote, and that reason was entirely rational and legitimate, as confirmed by the Appellate Division. *See* Appendix at 9a; *see also* Point (L), *supra*.

Petitioners rest on speculative assumptions regarding the motivations of individual members of the Town Board, while the record discloses the Town Board's detailed, legitimate reasons for its actions. The Town Board spoke with one voice when it set

forth the reasons why it adopted the SEQRA findings statement on July 25, 2006 rather than June 6, 2006. There exists no proof or evidence whatsoever that this explanation was a sham. Petitioners misleadingly try to create a controversy based on a single statement by one member of the Town Board that was taken out of context.[6]

- Petitioners contend that the Town Board's "change" in the SEQRA vote was conditioned upon the Community Benefits Package. *See* Petition

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[6] The Town Board member whose integrity and honesty Petitioners have attacked cogently explained, on the record, why he agreed on July 25, 2006 to vote to adopt the SEQRA findings.

> I think without question this has been a very time consuming project as far as the Town Board is concerned. I think it's a very important issue that I for one have taken an awful long time to come to my conclusions. . . . [T]he people from Caithness and LIPA answered each and every question, not only from the community but myself And quite frankly, it took me to that night before I was prepared and comfortable with the environmental concerns that I've had for the past six months or more. I am impressed by the fact that no leading environmentalist has opposed this project. . . . [A]s a result of that and as a result of what other experts have told me that this is an environmentally safe project, and because I've been advised of that, I'm prepared to vote tonight. And my vote is yes.

JR 3996-97. Nevertheless, even if this Board member's vote were discounted, the Town Board's June 2007 Resolution --- which the Appellate Division found to be an adequate and material explanation for the SEQRA re-vote - - would still have had sufficient votes to pass.

at 6. Again, they are simply wrong. In fact, the Town's SEQRA findings statement makes no reference at all to the Community Benefits Package, and never has. JR 4037-42.

POINT I. PETITIONERS NEVER PREVIOUSLY ASSERTED A FEDERAL CLAIM

A. None Of The Factors Warranting A Grant Of Certiorari Is Present In This Case

Rule 10 of the Supreme Court Rules sets forth three grounds which the Court will generally consider in granting certiorari. None of those grounds is present here. The Orders which Petitioners seek to review arose from a state appellate court, not from a United States court of appeals. There is no conflict on an important federal question between the Orders and any decision of a United States court of appeals or another state court of last resort. The Orders do not decide any important federal question. In fact, the Orders were based entirely on state law. *See* Appendix at 3a-23a.

B. Petitioners Did Not Raise A Federal Claim In The State Courts

Petitioners raised no federal claim in their pleadings or briefs in State Court, in the Appellate Division or in the New York Court of Appeals. Nor did any of those courts ever address a federal claim in this case, or base their determinations on a federal ground. This is fatal to a petition for certiorari.

"With very rare exceptions," this Court has "adhered to the rule in reviewing state court judgments . . . that we will not consider a petitioner's federal court claim unless it was either addressed by, or properly presented to, the state court that

rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83 (1997) (internal quotation marks and citations omitted); *see also Howell v. Miss.*, 543 U.S. 440 (2005) (explaining that this Court "has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim was 'either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review'") (quoting *Adams*).

There are several purposes underlying this rule. First, "questions not raised below are those on which the record is likely to be inadequate since it certainly was not compiled with those questions in mind." *Id.* at 221 (internal quotation marks and citations omitted). Second, "due regard for the appropriate relationship of this Court to state courts . . . demands that those courts be given an opportunity to consider the constitutionality of the actions of state officials, and equally important, proposed changes in existing remedies for unconstitutional action." *Id.* at 221-22. Finally, such a rule permits a state court "to rest its decision on an adequate and independent state ground." *Id.* at 222.

Petitioners make two arguments in an attempt to show that they allegedly raised a federal issue below. Neither of these arguments withstands scrutiny.

First: Petitioners claim that their petition in the State Court asserted that the Town Board's conduct was "arbitrary" and "ultra vires", and "otherwise unlawful, arbitrary and capricious." *See* Petition at 10. But this does not set forth even a

colorable reference to a constitutional or federal claim. In fact, Petitioner used these words to frame their arguments under state law (*e.g.* the purported violation of New York's Open Meetings Law and the allegation that the Town was imposing an unlawful condition which it had no power to impose under state law). They were never linked to any federal or constitutional claim. This situation is similar to the purported substantive due process claim the Court dismissed in *Cornell v. Green*, 163 U.S. 75 (1896). There, the plaintiff brought an action in state court (later removed to federal court) seeking to set aside a foreclosure on the ground that he was not a party to the proceedings, and that the judgment of foreclosure was not binding on him. The lower court denied his claim, and the plaintiff appealed to this Court, which held that it had no jurisdiction. The Court explained that the Constitution "is not mentioned in the bill of [plaintiff], or in the demurrer of the defendant, or in the decree or the opinion of the court. The case appears to have been treated throughout as depending upon a question of chancery practice, not of constitutional right." *Id.* at 79. As in this case, the "first indication of anything like an intention on the part of the plaintiff to invoke the protection of the constitution of the United States is in the suggestion, in the assignment of errors [to the Supreme Court], 'that said finding deprived said complainant of his property without due process of law.'" *Id.* The Court dismissed the case for want of jurisdiction. The same result is warranted here.

Second: Petitioners further claim that, in a June 12, 2007 legal brief to the State Court, they

quoted a case holding that due process rights were violated by a municipal board's *ex parte* receipt and consideration of material outside the record. *See* Petition at 11. But Petitioners' brief only quoted an unreported case, which in turn quoted a commentator, who gave *his opinion* that the "due process rights" of participants of zoning board hearings would be disregarded if evidence were presented to the board without the ability of the hearing participants to rebut it. *Cilla v. Mansi*, No. 3563-02, 2002 WL 1275122 (Sup. Ct. Suffolk County March 5, 2002) (quoting Terry Rice,. *Zoning & Land Use*, 48 Syracuse L. Rev. 1075, 1106 (1998)). Unlike the commentator, however, the court used more limited language, stating that "[w]here evidence has been received under circumstances which would deny a party the opportunity to appraise or rebut it, the courts have expressed disapproval of the practice." The court never mentioned any state or federal constitutional violation at all. 2002 WL 1275122, at *5 (emphasis added).[7]

Moreover, to the extent a passing reference to this case could suffice to raise a "due process claim," the claim would be a *procedural* due process claim (since it would go to the fairness of the hearing that took place before the zoning board), not the

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[7] Petitioners' brief cited this unreported case in support of their argument that Cauthiness and the Town had violated New York's Open Meetings Law. But Petitioners abandoned this argument when they went to the Appellate Division and the New York Court of Appeals, and they cannot resuscitate it now before this Court. *See, e.g., Sochor v. Fla.*, 504 U.S. 527 (1992) (holding that the Supreme Court had no jurisdiction to review a constitutional claim that was "not preserved for appeal" in state court).

substantive due process claim that petitioners now raise for the first time. *See, e.g.*, *Daniels v. Williams*, 474 U.S. 327 (1986) (Stevens, J., dissenting) (explaining that *substantive* due process claims apply to "arbitrary government actions regardless of the fairness of the procedures used to implement them," while *procedural* due process claims apply to the state taking an individual's life, liberty or property "without providing appropriate procedural safeguards") (internal quotation marks and citations omitted).

Even if Petitioners had actually made a reference to a constitutional violation (which they did not), the "vague appeal to constitutional principles does not preserve" a constitutional claim, and a "party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71 (1988) (citing *Taylor v. Illinois*, 484 U.S. 400 (1988) ("A generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision in the Bill of Rights.")).

In *Howell*, 543 U.S. at 443, the Court held that no federal question was preserved. "Petitioner's brief in the State Supreme Court did not properly present his claim as one arising under federal law. . . In the relevant argument, he did not cite the Constitution or even any cases directly construing it, much less any of this Court's cases." *Id.* That is exactly the situation here. The *Howell* Court explained how a federal claim should be preserved in

state court: A "litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief . . . by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal'." *Id.* at 444 (internal quotation marks and citation omitted). Of course, none of this was done here.

Petitioners cite *Braniff Airways, Inc v. Neb. State Bd. of Equalization & Assessment*, 347 U.S. 590 (1954), to support their contention that they properly raised and preserved a federal question. *See* Petition at 11. *Braniff* involved an airline seeking to have Nebraska's tax assessment statutes declared unconstitutional since Nebraska's tax allegedly imposed a burden on interstate commerce. In *Braniff*, there was no question that the airline had raised a federal constitutional claim. The problem was that the airline had relied on the *wrong* constitutional provision, *i.e.*, the Court explained that the airline should have relied on the Due Process Clause instead of the Commerce Clause. "Though inexplicit, we consider the due process issue within the clear intendment [of the airline's constitutional claims] and hold such issue sufficiently presented." *Id.* at 599. In this case, nothing in the record demonstrated that Petitioners ever presented *any* constitutional or federal claim below. Specifically, in contrast to the constitutional claim which Petitioners now seek to make for their first time, all their prior challenges to the Community Benefits Package were based on state law grounds.

C. Petitioners Did Not Properly Specify Any Federal Claims In The Petition

When a state court judgment is being reviewed, Supreme Court Rule 14(1)(g)(i) requires that a petitioner set forth:

> specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . .

To this end, Rule 14(1)(h)(i)(v) requires Petitioners to include in the appendix to the petition any "material required by subparagraphs 1(f) or 1(g)(i)," and Rule 14(1)(h)(i)(vi) allows Petitioners to include "any other material the petitioner believes essential to understand the petition."

Petitioners have failed to comply with these rules. They did not attach any of the pleadings or briefs they filed in the courts below, even though they contend (inaccurately) that they raised a federal question and preserved it for review in those pleadings and briefs. They have also failed to point to any court opinion below where any federal

question was addressed, which is not surprising given no federal question was ever presented to any court below. Rule 14(4) explicitly states that "[t]he failure of a petitioner to present with accuracy, brevity and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition."

D. The Orders Were Based On Independent And Adequate State Grounds

It is well-settled that the Supreme Court has no jurisdiction to hear a case if there is an independent and adequate state law ground to support the judgment below. *See, e.g., Fox Film Corp. v. Muller*, 296 U.S. 207 (1935). As discussed above, all the decisions below in the State Court and Appellate Division were based on state law, not federal or constitutional claims. While the Court of Appeals denied leave to appeal without giving an explanation, it is enough that the Court's decision *might* have rested on an independent and adequate state law ground. *Durley v. Mayo*, 351 U.S. 277 (1956).

POINT II. PETITIONERS DID NOT SUFFER A VIOLATION OF SUBSTANTIVE DUE PROCESS

As discussed in Point I above, Petitioners never raised any federal constitutional claim in the courts below, although they now try to argue that they were deprived of substantive due process. However, even if Petitioners had raised such a constitutional claim below (which they did not), it is meritless. A substantive due process claim requires a deprivation of a property interest that is the result of arbitrary and egregious conduct by municipal officials. *See, e.g., City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Found.*, 538 U.S. 188 (2003). Petitioners do not meet this standard.

Petitioners give but short shrift to their alleged property interest. In the last paragraph of the Petition, they assert that their "substantive property interests [are] in their own real estate, and its environment, and [they have] a property interest under New York law as injured-in-fact entities and persons authorized to challenge the municipal resolutions." *See* Petition at 20. To the contrary, however, the lower courts decided that, under applicable state law, Petitioners did not have a sufficient property interest to give them standing to challenge the municipal decisions because their property did not lie in sufficient proximity to the Project to warrant a presumption of injury, because they did not submit any proof showing actual injury, and because they suffered no injury different from other members of the public. JR 16. Additionally, the lower courts also decided that an adequate

environmental review had been done and that there was no adverse effect to Petitioners' "environment". JR 4082-83.

Moreover, not all property rights derived from state law are protected by substantive due process (as opposed to procedural due process). *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985) (Powell, J., concurring) ("Even if one assumes the existence of a property right, however, not every such right is entitled to the protection of substantive due process. While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, . . . *substantive due process rights are created only by the Constitution.*") (emphasis added).

Applying this reasoning, the lower federal courts have held that state-created property rights alone cannot serve as the basis for a substantive due process claim. *Greenbriar Vill., L.L.C. v. Mountain Brook City*, 345 F.3d 1258 (11th Cir. 2003) (holding that a substantive due process claim cannot be based on a "state-granted and-defined property right"); *Kauth v. Hartford Ins. Co. of Ill.*, 852 F.2d 951 (7th Cir. 1988) (holding that where a plaintiff alleges a substantive due process claim based "on a state-created property interest, without alleging a violation of some other substantive constitutional right or that the available state remedies are inadequate, the plaintiff has not stated a substantive due process claim"). The Court has "always been reluctant to expand the concept of substantive due process." *Washington v. Glucksberg*, 521 U.S. 702 (1997), and, respectfully, should not do so here.

Petitioners are effectively asserting that they have a property interest in the proper application of zoning laws against a third party, *i.e.* Caithness. But this Court has never held that a substantive due process right arises based upon the application or enforcement of a zoning law against a third party. Not only has this Court failed to establish such a right, the Second Circuit has explicitly rejected such a claim. Since a town board has broad discretion under New York law in granting permits, site plans and variances, the Second Circuit has held that "[n]o due process right is implicated here because the [plaintiffs] have no right to demand that the Municipal Defendants enforce the zoning laws," and a grant of a special permit, site plan or variance "did not infringe upon any protected property interest of the [plaintiffs]." *Gagliardi v. Vill. Of Pawling*, 18 F.3d 188 (2d Cir. 1994).

Not one of the cases cited in the Petition holds that the imposition of a zoning approval condition relating to the timing of agreements concerning an openly-discussed Community Benefits Package rises to the level of a constitutional violation. Instead, Petitioners cite a few New Jersey cases invalidating approvals that were bargained for in exchange for payments as invalid and arbitrary under New Jersey law. But the Supreme Court has held that "only the most egregious official conduct can be said to be 'arbitrary' in the constitutional sense." *City of Cuyahoga Falls*, 538 U.S. at 198 (internal quotation marks and citations omitted) (emphasis added). The Supreme Court has described this as an abuse of

power that "shocks the conscience." *County of Sacramento v. Lewis*, 523 U.S. 833 (1998).[8]

It is well-settled that this Court's "role is not and should not be to sit as a zoning board of appeals." *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting). Indeed, the lower federal courts have consistently recognized that "the due process clause may not ordinarily be used to involve federal courts in the rights and wrongs of local planning boards." *United Artists Theatre Circuit, Inc. v. Township of Warrington, Pa.*, 316 F.3d 392 (3d Cir. 2003) (internal quotation marks and citation omitted). Moreover, "every appeal . . . from an adverse ruling of the local planning board involves some claim of abuse of legal authority, but it is not enough simply to give these state law claims constitutional labels such as 'due process' or 'equal protection' in order to raise a substantial federal question . . . . Land-use decisions are matters of local concern, and such disputes should not be transformed into substantial due process claims based only on allegations that government officials acted with 'improper' motives." *Id.* at 402 (internal quotation marks and citation omitted). "Arbitrary conduct that might violate zoning regulations as a matter of state law is not sufficient to demonstrate conduct so outrageously arbitrary as to constitute a gross abuse of government authority that will offend the substantive component of the due process clause." *Natale v. Town of Ridgefield*, 170 F.3d 258 (2d Cir.

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[8] All of the state cases cited by Petitioners involve alleged violations of *state* law, and none of them even alluded to the United States Constitution. *See* Petition at 12-15 (citing cases).

1999) (emphasis added) (citing cases). Rather, substantive due process "is an outer limit on the legitimacy of government action. It does not forbid governmental actions that might fairly be deemed arbitrary or capricious and for that reason correctable in a state court lawsuit seeking review of administrative action. Substantive due process standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of government authority." *Id.* No such conduct occurred here.

Petitioners' proposal that this Court effectively constitutionalize zoning board decisions "would take the development of rules and procedures in this area out of the hands of legislatures and state courts shaping policy in a focused manner and turn it over to federal courts applying the broad parameters of the Due Process Clause. There is no reason to constitutionalize the issue this way." *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, No. 08-6, 2009 WL 1685601 (U.S. June 18, 2009).

POINT III. PETITIONERS LACK STANDING

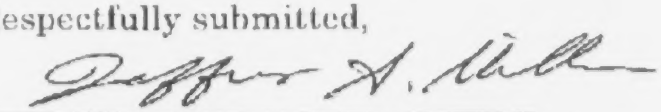
The Court has an obligation to assure itself of a litigant's standing to bring a claim under Article III of the Constitution. *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332 (2006). "To do so, a plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Id.* at 341 (internal quotation marks and citation omitted). This is a "threshold question in every federal case." *Ross v. Bank of Am., N.A.*, 524 F.3d 217 (2d Cir. 2008). Here, Petitioners have no injury-in-fact. To the extent Petitioners allege an injury to their property, the State Court has determined that Petitioners did not live close enough to the Project to warrant an inference of injury, did not submit any affidavits to show actual injury, and failed to demonstrate any injury different from the public at large. To the extent Petitioners allege an environmental injury, the New York Court of Appeals in the SEQRA Lawsuit has upheld LIPA's conclusion that the Project will not result in any significant adverse environmental impact. Accordingly, Petitioners lack Article III standing.

CONCLUSION

Rule 10 of this Court states that a "petition for a writ of certiorari will be granted only for compelling reasons". No such reason has been shown here. It is therefore respectfully requested that this Court deny the petition for certiorari.

Dated: June 25, 2009

Respectfully submitted,

By 

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